Supreme Court, U.S.
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NO. 90-1884 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Prudential Insurance Company
of America,

Petitioner,

v.

Billy W. Brown,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In The
Fourteenth Court of Appeals

NO. B14-89-00695-CV

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant

V.

BILLY W. BROWN, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 81-31687

OPINION

Prudential Insurance Company of America appeals from a judgment for breach of an insurance contract and breach of the duty of good faith and fair dealing rendered in favor of Billy W. Brown. Prudential brings eight

points of error, claiming (1) the trial court erred in granting the new trial; (2) the Employment Retirement Insurance Security Act ("ERISA") preempted Brown's claims; (3) the contract between Brown and his doctor was illegal; (4) the evidence was legally and factually insufficient to support the jury's findings of Brown's mental anguish; (5) the submission of two special issues permitted the jury to compensate Brown twice for the same element of damages; (6) the evidence was legally and factually insufficient to show that Prudential acted with conscious indifference to, or in reckless disregard of, Brown's rights; and (7) the trial court erred in excluding

material, admissible evidence offered by Prudential. We affirm.

In 1979, Brown was diagnosed with bladder cancer. Chemotherapy proved ineffective as a treatment against Brown's cancer. Brown then began a series of radiation treatments in preparation for surgery to remove his bladder and prostate gland. Without the surgery, the probability that Brown would die within five years was 85%. Prior to the surgery, Brown learned of Dr. Stanislaw R. Burzynski and alternative cancer treatments he was administering. Brown contacted Dr. Burzynski and began receiving treatment with a series of drugs called antineoplastons, which Dr. Burzynski had developed. Within six weeks of

beginning Dr. Burzynski's treatment, Brown was diagnosed by his urologist as being free from all bladder cancer. Over ten years later he has had no recurrence of bladder cancer.

At the time Brown received his treatment from Dr. Burzynski, he had group insurance with Prudential, which was purchased through the Independent Garagemen's Association Insurance Trust ("the insurance trust"). The insurance trust served as a conduit through which premiums were paid by various employers for the purpose of obtaining major medical and life insurance for the employer members of the Independent Garagemen's Association. Brown's claims to Prudential for Dr. Burzynski's treatment was forwarded by the insurance

trust to Prudential. Prudential denied Brown's claims on the grounds that the treatment was not reasonably medically necessary and, therefore, was not covered under the group insurance policy. Brown filed suit against Prudential for breach of its contract of insurance. Brown also alleged that Prudential had breached its duty of good faith and fair dealing. The case was originally tried on May 20, 1986. The jury verdict and judgment in the first trial were in favor of Prudential. Brown filed a motion for a new trial on the grounds of jury misconduct. The trial court granted Brown's motion and, on January 26, 1989, the case was tried again. The jury verdict and judgment in the second trial were in Brown's favor.

In its first point of error Prudential claims the trial court abused its discretion in granting Brown's motion for new trial because the record from the hearing on the motion does not show that an outside influence affected the jury's decision. Following the first trial, Brown filed a motion for new trial on the grounds that the jury had engaged in misconduct. The affidavits of the jurors showed that the jurors received outside influence from a newspaper article that stated that Dr. Burzynski was the subject of a federal grand jury probe and under court order not to ship his medications across state lines. The affidavit further alleged that jurors also received outside influence from a friend of one of the

members of the jury. That friend was a lawyer and told one of the members of the jury that Dr. Burzynski was a "quack" and that Prudential would win the case. The trial court granted Brown's motion for new trial and Prudential now attempts to appeal that ruling.

An order granting a new trial is not reviewable on appeal if, as here, the motion for new trial is timely filed and the court's order is made during its period of plenary jurisdiction over the judgment. Cummins v. Paisan Construction Co., 682, S.W.2d 235, 236 (Tex. 1984). We have no jurisdiction to consider this point. Hinote v. Local 4-23, 777 S.W.2d 134, 146 (Tex. App. --

Houston [14th Dist.] 1989, writ denied). Point of error one is overruled.

In his second and third points of error Prudential claims the trial court erred in not granting Prudential's motion for judgment notwithstanding the verdict because all of the state law claims pleaded by the plaintiff are preempted by ERISA, and in denying Prudential's motion to strike Brown's demand for jury trial because ERISA does not permit jury trials.

The Independent Garagemen's Association ("IGA") was an association composed of employers whose primary business was repair of automobiles. The IGA created an insurance trust for the purpose of obtaining major medical and life insurance for the employer members

of the association. Brown's employer, Sonny's Automotive Transmission Service, obtained Prudential insurance through the insurance trust. The insurance trust was created so the employers could obtain insurance at group rates. The trust's only duties were to send bills to the employers, accept premium payments, and distribute claims. Prudential paid the claims, but the trust administered them. Prudential determined the amount of the premiums to be charged to the employers. The employers had no input into the operation or administration of the trust or the selection of insurance.

Prudential argues that the insurance trust is an "employee welfare benefit plan" under ERISA and,

therefore, Brown's state law causes of action are preempted. ERISA preempts state common law actions based on the improper handling of a claim for benefits under an employees' group insurance policy. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). The rationale for federal preemption of state causes of action covered by ERISA is to prevent trustees of plans from being subjected to the threat of conflicting and inconsistent federal and state regulations. Ames v. Ames, 776 S.W.2d 154 (Tex. 1989). ERISA regulates employee welfare benefit plans including group health insurance policies. ERISA defines an "employee welfare benefit plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment[.]

29 U.S.C. § 1002(1).

The insurance trust involved in this case was neither established nor maintained by a statutory employer or employee organization, See 29 U.S.C. § 1002(4), 1002(5), and therefore, falls outside the scope of ERISA. Neither

Sonny's Transmission, nor any other employer, participates in the insurance trust's day-to-day operation or administration. The activities of the trust consist of transferring premium payments and claims between the employees and the insurance companies. ERISA does not regulate "bare purchases" of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers, or assumes responsibility for the policy or its benefits. See Taggart Corp. v. Life and Health Benefits Admin. Inc., 617 F.2d 1208, 1211 (5th Cir. 1980). Because the trust cannot be considered an employee welfare benefit plan, ERISA does not preempt Brown's state law

causes of action. Points of error two and three are overruled.

In its fourth point of error Prudential claims the trial court erred in not granting Prudential's motion for judgment notwithstanding the verdict because the underlying contract between Brown and Dr. Burzynski and Burzynski research institute was illegal. Prudential argues that, because antineoplastons had not been approved by the Food and Drug Administration ("FDA") before Dr. Burzynski administered them to Brown, the contract between Brown and Dr. Burzynski was illegal and that, as a matter of public policy, Prudential should not pay for the use of drugs that are not approved by the FDA.

Prudential's argument fails for two reasons. First, the illegality defense does not prevent Brown from recovering on his contract with Prudential. The contract sued on is the insurance contract, not the contract between Brown and Burzynski.

Second, Prudential did not incorporate the public policy it now urges when it drafted its contract with Sonny's Transmission. The insurance contract could have precluded payment for illegal drugs or experimental drugs, or provided that all drugs must have been declared safe and effective by the FDA before they would be covered expenses under the contract. See McLaughlin v. Connecticut General Life Ins. Co., 565 F. Supp. 434, 449 (N.D.

Ca. 1983). Where the terms of an insurance policy are plain, definite, and unambiguous, the courts cannot vary those terms. Gulf Atlantic Life Ins. Co. v. Disbro, 613 S.W.2d 511, 512 (Tex. Civ. App. -- Beaumont 1981, no writ). The policy provides that Prudential will not cover "charges for any service or supply not reasonably necessary for the medical care of the patient's sickness or injury." That is the exclusion under which Prudential attempted to deny coverage. The policy does not exclude charges for drugs not approved by the FDA. Point of error four is overruled.

In its fifth point of error Prudential claims the trial court erred in submitting special issues 3 and 4 to the jury because there was no evidence

or insufficient evidence of mental anguish suffered by Brown. An objection to an issue that the evidence is factually insufficient to support the submission of the issue does not preserve factual insufficiency of the evidence for our review. Further, Prudential failed to file a motion for new trial that challenged the factual sufficiency of the evidence. See Tex. R. Civ. P.324b. Therefore, our review is limited to the legal sufficiency of the evidence.

With regard to legal insufficiency points, we will consider only the evidence tending to support the finding, viewing it in the most favorable light in support of the finding, giving effect to all reasonable

inferences that may properly be drawn therefrom and disregarding all conflicting evidence. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965).

A plaintiff can establish the existence of pain and suffering by circumstantial evidence. Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Civ. App. -- Texarkana 1978, no writ). The courts presume pain and suffering and mental anguish naturally accompany a severe physical injury. Griffith v. Casteel, 313 S.W.2d 149, 152 (Tex. Civ. App. -- Houston 1958, writ ref'd n.r.e.). Because of its nature, the existence of pain and suffering and mental anguish is not capable of being accurately determined and, accordingly, there is no fixed rule or standard for

its measurement. Thus, the degree must be left to the sound judgment of the jury, subject only to correction by the courts for abuse and excessiveness. Landreth v. Reed, 570 S.W.2d at 489.

Brown testified that he was "upset" with the way Prudential handled his claim. He said he had seen inter-office memos that showed how Prudential tried to deny his claim. He also was afraid he might have to sell his family farm to pay his bills. Further, when he was in the hospital, he was not released at the time he was supposed to be released because he could not pay the bill, and Prudential refused to pay it. We conclude there was legally sufficient evidence to show Brown suffered mental anguish as a result of Prudential's

refusal to pay his claim. Point of error five is overruled.

In its sixth point of error Prudential claims the trial court erred in submitting special issues 2 and 5 because the submission of both issues permitted the jury to compensate Brown twice for the same element of damages, i.e., mental anguish from Prudential's claims handling decisions.

Question 2 asked the jury if Prudential breached the duty of good faith and fair dealing it owed to Brown. Question 5 asked the jury if Prudential unreasonably delayed in communicating its denial of Brown's claim. Prudential argues that Question 5 is merely a phase or shade of Question 2. Prudential did not object to Question 2, or Question 5

on the grounds that one was a phase or shade of the other. Therefore, Prudential has waived point of error six. Chrysler Corp. v. Roberson, 619 S.W.2d 451, 459 (Tex. Civ. App. -- Waco 1981, no writ); Tex. R. Civ. P. 274.

In its seventh point of error Prudential claims the trial court erred in submitting special issue number 8 to the jury because there was no evidence of Prudential's alleged "conscious indifference to, or reckless disregard of Brown's rights or welfare." Question 8 asked the jury if Prudential's failure to act fairly and in good faith toward Brown demonstrated a conscious indifference to, or reckless disregard of his rights or welfare.

Clinton Miller, an expert in insurance bad faith litigation, testified that, based on his review of Prudential's claim file, Prudential did not meet the standard in the industry for the handling of Brown's claim. An internal memo stated that Prudential needed "a little more to base [its] rejection on rather than the standard exclusion 'charges . . . not reasonably necessary . . . etc.'" Miller testified that the adjuster who wrote the memo did not have a reasonable basis to reject the insured's medical bills. Miller testified that the standard in the industry, due to the superiority of the insurance company in the bargaining process, is that, the policy is construed in favor of the insured. If

the insurance company discovers that a treatment has cured the insured, it should pay the insured's claims. Prudential, in trying to recoup money it had already paid to Brown for this treatment, deducted $1,415 from benefits they had already paid Brown. Prudential deducted the $1,415 while Brown was in the hospital. He could not leave the hospital until he paid the money out of his own funds. This action did not meet the industry standard and, in Miller's opinion constituted bad faith.

Later, Prudential claimed they were not going to pay Brown because his treatment was "experimental in nature." There was, however, no exclusion in Brown's policy for experimental treatment. Prudential paid claims to

other patients who were undergoing the same treatment from Dr. Burzynski. Prudential took from February 1980 to May 30, 1980 to send a denial letter to Brown. This four month delay was unreasonable in Miller's opinion. The denial letter sent to Brown stated three to four exclusions that were not included in Brown's policy. The letter denied the claim on the basis that "the service or supply must not be educational or experimental in nature." That exclusion was not included in Brown's policy. We find this is sufficient evidence to support the finding that Prudential acted with conscious indifference to, or in reckless disregard of Brown's rights or

welfare. Point of error seven is overruled.

In its eighth point of error Prudential claims the trial court erred in excluding the testimony of Glenda Steed and Dr. Emil J. Freireich and testimony contained in the bills of exceptions from Dr. Stanislaw R. Burzynski and Angelina Wise. The testimony offered by Prudential from Glenda Steed and Dr. Emil Freireich, and the bills of exceptions from Angelina Wise and Dr. Burzynski are hearsay within the definition of Tex. R. Civ. Evid. 801. The testimony Prudential attempted to offer came from testimony at the first trial. The testimony of a witness at a former hearing is not admissible, unless there is a showing by

the proponent of the evidence that the witness is unavailable. Tex. R. Civ. Evid. 804.

The requirement of unavailability in rule 804 establishes a preference for testimony, indicating that the particular indicia of trustworthiness in the exceptions are regarded as inferior to the testimonial conditions. Welborn, Article VIII: Hearsay, 20 Hous. L. Rev. 445, 538 (1983 Tex. R Evid. Handbook). Rule 804(a) names five separate grounds that suffice to constitute unavailability: (1) a claim of privilege; (2) refusal to testify; (3) lack of memory; (4) death or physical or mental illness or infirmity; (5) absence from the hearing and inability of the proponent to

procure his declarant's attendance or testimony by process or other reasonable means. Prudential did not demonstrate unavailability through any of these means. Point of error eight is overruled.

The judgment of the trial court is affirmed.

/s/ Joe L. Draughn

Justice

Judgment Rendered and Opinion filed August 9, 1990.

Panel Consists of Justices Sears, Cannon and Draughn.

Do Not Publish - TEX. R. APP. P.90.

[Entered April 3, 1989]

NO. 81-31687

BILLY W. BROWN,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	HARRIS COUNTY,
	§	T E X A S
PRUDENTIAL	§	
INSURANCE COMPANY	§	
OF AMERICA,	§	
	§	151ST JUDICIAL
Defendant	§	DISTRICT

FINAL JUDGMENT

BE IT REMEMBERED that on the 26th day of January, 1989, the above entitled and numbered cause came on to be heard for trial. Plaintiff Billy W. Brown appeared in person and by way of his counsel of record Millard A. Johnson, Calvin, Dylewski, Gibbs, Maddox, Russell & Verner, P.C. Defendant The Prudential Insurance Company of America appeared by and

through its counsel of record William J. Dyer, Weil, Gotshal and Manges, and Kathryn Page, Baker & Botts. All parties announced ready for trial. A jury of twelve men and women, good and true, was duly sworn and impanelled.

After having heard the evidence adduced by each party at trial, and having heard the arguments of counsel thereupon, on February 20, 1989, the jury returned its unanimous verdict, including the following answers to the written questions submitted to the jury by this Court:

QUESTION NO. 1.

Did Prudential breach its contract of insurance with Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 2.

Did Prudential breach the duty of good faith and fair dealing it owed to Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 3.

Was Prudential's breach of the duty of good faith and fair dealing a proximate cause of mental anguish to Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 4.

What sum of money if paid now in cash, would reasonably compensate Billy W. Brown for the mental anguish he has suffered, if any, because of Prudential's breach of the duty of good faith and fair dealing, if any?

ANSWER: $65,000.00.

QUESTION NO. 5.

Did Prudential unreasonably delay in communicating its denial of Billy W. Brown's claim?

ANSWER: Yes.

QUESTION NO. 6.

Was such unreasonable delay by Prudential, if any, a proximate cause of damages to Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 7.

What sum of money if paid now in cash, would reasonably compensate Billy W. Brown for the mental anguish he has suffered, if any, because of the unreasonable delay, if any?

ANSWER: $10,000.00.

QUESTION NO. 8.

Did Prudential's failure to act fairly and in good faith toward Billy W. Brown demonstrate a conscious indifference to, or reckless disregard of his rights or welfare?

ANSWER: Yes.

QUESTION NO. 9.

What sum of money, if any, do you find should be assessed against Prudential Insurance Company as exemplary damages?

ANSWER: $500,000.00.

QUESTION NO. 10.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Billy W. Brown for attorney's fees incurred in the trial of this case?

ANSWER: $184,000.00.

QUESTION NO. 11.

What sum of money, if any, if paid now in cash, would reasonably compensate Billy W. Brown for attorney's fees, if there is:

a. An appeal of this Court's decision to a Court of Appeals?

ANSWER: $20,000.00.

b. An application for writ of error filed in the Texas Supreme Court after an appeal of a Court of Appeals?

ANSWER: $5,000.00.

c. An application for writ of error granted by the Texas Supreme Court?

ANSWER: $5,000.00.

d. A petition for writ of certiorari filed in the

U.S. Supreme Court after a writ of error is filed in or granted by the Texas Supreme Court?

ANSWER: $5,000.00.

e. A writ of certiorari granted by the U.S. Supreme Court?

ANSWER: $5,000.00.

In consideration of the foregoing jury verdict, and in consideration of the stipulation between the parties that the amount Defendant Prudential failed to reimburse Plaintiff Billy W. Brown for certain medical care of his cancer accruing under his contract of insurance was $42,000.00 as of October 14, 1981, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff Billy W. Brown have Judgment against and recover from the Defendant

The Prudential Insurance Company of America as follows:

1. The sum of FORTY-TWO THOUSAND AND NO/100 DOLLARS ($42,000.00) as actual damages for reimbursement of medical expenses incurred as a result of Prudential's breach of contract, with prejudgment interest of THIRTY ONE THOUSAND THREE HUNDRED FIFTY THREE AND 24/100 DOLLARS ($31,353.24) accruing at the rate of ten percent per annum from October 14, 1981 through April 2, 1989, plus the sum

of $11.51 per diem thereafter until the date of this Judgment;

2. The FIVE THOUSAND FORTY AND NO/100 DOLLARS ($5,040.00) ($42,000.00 x .12) as statutory penalty Article 3.62 of the Texas Insurance Code for failure of Defendant to pay timely Plaintiff's claims.

3. SIXTY FIVE THOUSAND AND NO/100 DOLLARS ($65,000.00) as actual damages for mental anguish for Prudential's denial of the claim with no reasonable

basis and/or the failure of Prudential to reasonably investigate the claim, together with prejudgment interest of FORTY-NINE THOUSAND THREE HUNDRED FIFTEEN AND 89/100 dollars ($49,315.89) accruing at the rate of ten percent per annum from 180 days after March 4, 1981, the date of Plaintiff's demand letter to Defendant, through April 2, 1989, plus the sum of $17.81 per diem thereafter until the date of this Judgment;

4. The sum of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) as actual damages for mental anguish for Prudential's unreasonable delay in communicating its denial, together with prejudgment interest of SEVEN THOUSAND FIVE HUNDRED EIGHTY SEVEN AND 06/100 dollars ($7,587.06) accruing at the rate of ten percent per annum from 180 days after March 4, 1981 through April 2, 1989, plus $2.74 per diem thereafter until the date of this Judgment;

5. The sum of FIVE HUNDRED THOUSAND AND NO/100 DOLLARS ($500,000.00) as punitive damages;

6. The sum of ONE HUNDRED EIGHTY FOUR THOUSAND AND NO/100 DOLLARS ($184,000.00) as Plaintiff's reasonable attorney's fees for services rendered through the trial of this case;

7. The sum of TWENTY THOUSAND AND NO/100 DOLLARS ($20,000.00) in the event of an appeal to the Court of Appeals;

8. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event of an Application for Writ of Error to the Supreme Court of Texas;

9. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event the Texas Supreme Court grants such Writ of Error;

10. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event that an Application for Writ of Certiorari is made

to the United States Supreme Court; and

11. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event that the United States Supreme Court should grant Writ of Certiorari in this cause.

IT IS FURTHER ORDERED that the award of attorney's fees awarded herein is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED that the Judgment hereby rendered shall bear interest at the rate of ten percent (10%) per annum from the date of Judgment until paid.

IT IS FURTHER ORDERED that the causes of action stated in Plaintiff's Fourth Amended Original Petition are not preempted by the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et. seq.

IT IS FURTHER ORDERED that all costs of court expended or incurred in this cause are hereby adjudged against the Defendant The Prudential Insurance Company of America. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary.

All other relief not expressly granted herein is specifically denied.

SIGNED this _____ day of _____

_____, 1989.

/s/
ALICE OLIVER TREVATHAN
Judge Presiding

APPROVED AS TO FORM:

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MADDOX, RUSSELL & VERNER
A Professional Corporation

By: /s/

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[Entered May 2, 1989]

NO. 81-31687

BILLY W. BROWN,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	HARRIS COUNTY,
	§	T E X A S
PRUDENTIAL	§	
INSURANCE COMPANY	§	
OF AMERICA,	§	
	§	151ST JUDICIAL
Defendant	§	DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CAME ON TO BE HEARD before the Court on January 17, 1989, a trial in limine on the issue of preemption of Plaintiff's state law claims by the provisions of the Employment Retirement Security Act of 1974 ("ERISA"), and the Court after hearing the evidence and the arguments of counsel enters the following Findings of Fact and Conclusions of Law:

I.

Findings Of Fact

1. At all times relevant to this lawsuit, the Independent Garagemen's Association ("IGA") was an association in fact comprised of employers involved in a number of businesses which were interrelated only in the sense that they all performed some work related to automobiles. (Richey, pp. 11, 13, 47-49).

2. On March 18, 1964 the Independent Garagemen's Association Insurance Trust (the "Insurance Trust") was created by the execution of an Agreement and Declaration of Trust by the Independent Garagemen's Association (the "Association") for the purpose of obtaining major medical and life

insurance for the employer members of the Association. (Depo. Richey, p. 10).

3. It was not mandatory that members of the IGA purchase insurance through the Association, but upon becoming members, these employers would be solicited to purchase insurance. Upon becoming a member of the Association, the employer would be contacted by a Prudential agent who had obtained the employer's name from a membership list provided by the IGA, and who would seek to sell insurance to the employer. (Richey, pp. 14, 36).

4. In the event that an employer did elect to purchase insurance through the IGA, that employer could choose to either pay all or a part of the premiums for the policy on behalf of

the employee, or charge the employee for such insurance without contributing anything. Prudential encouraged but did not require employer contribution. (Richey, p.87).

5. An employer who desired to obtain Prudential insurance through the IGA was customarily required to execute an adoption of and subscription to a written agreement and declaration of trust, which purported to created a trust called the Independent Garagemen's Association Insurance Trust (IGAIT). (Richey, p. 37).

6. Plaintiff Billy Brown's employer, Sonny's Automotive Transmission Service, obtained Prudential insurance through the IGA, although there is no evidence that

Sonny's Automatic Transmission Service did adopt and subscribe to the trust agreement. It was apparently not required to do so.

7. The IGAIT was created in 1964, long before the enactment of the Employment Retirement Income Security Act of 1974 (ERISA). The written agreement and declaration of trust by which the IGAIT was formed expired by its own provisions in 1985. The agreement and declaration was not, at least prior to 1985, amended to conform to the requirements of ERISA. (Richey Ex. 2, p. 5).

8. According to the written declaration of trust of the IGAIT, literally any "employer" may become a "subscriber" to the "trust," the sole

purpose of which was to facilitate employers' purchases of insurance. (Richey, pp. 33, 96 and Ex. 2).

9. The IGAIT was a mere conduit for the transmission of insurance premiums from the employers to Prudential, in that all premiums that were collected from the employers on a monthly basis were simply forwarded to Prudential, with the IGAIT retaining a small percentage for its marketing and billing services. The IGAIT did not have a "trust fund" to administer, since it simply forwarded the premiums it collected to Prudential while taking a percentage of the premiums as compensation for its services. (Richey, pp. 28, 95).

10. The IGAIT consistently showed a profit from its retention of premiums, and never operated at a loss. (Richey, pp. 30, 31, 58, 59).

11. Employees of the Association's members could not belong to the Association or independently obtain insurance through the Insurance Trust. (Richey, p. 34).

12. Prudential made the sole determination of the premiums to be charged to the employers and the employers had no input into the operation or administration of the "trust" or the selection of insurance. (Richey, pp. 40, 78).

13. Neither the "trust," nor Prudential ever filed a written employee benefit plan with the Department of

Labor or the Internal Revenue Services. (Richey, p. 40).

14. There was no statement of "ERISA rights" in either the Certificate of Insurance or in the Group Policy issued to the IGA by Prudential, nor was there any evidence that Plaintiff was ever provided such a statement as required by Federal law.

15. The only communications which occurred between the employees of the Association's members and the Insurance Trust were for additional information in connection with the Insurance Trust's handling of claims for Prudential. (Depo. Richey, p. 83).

16. The transactions between the Insurance Trust and Prudential

consisted of the mere purchase of insurance. (Depo. Richey, p. 10).

II.

Conclusions Of Law

1. The transactions between the Insurance Trust, its employer members, and Prudential were mere purchases of insurance.

2. The decision of the United States Court of Appeals for the Fifth Circuit in Taggart Corporation v. Life and Health Benefits Administration, 617 F.2d 1208, cert. denied sub nom., 450 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981), is dispositive of the issues before the Court.

3. The Insurance Trust agreement does not qualify as a written

plan or instrument within the meaning of 29 U.S.C. § 1102.

4. The Insurance Trust is not an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1).

5. The Insurance Trust functioned as a conduit of premium payments by employer member's employees to Prudential.

6. ERISA does not regulate exclusive purchases of health insurance when the purchaser neither directly or indirectly owns, controls, administers or assumes responsibility for the policy or its benefits. Taggart Corporation v. Life and Health Benefits Administration, 617 F.2d 1208, cert. denied sub nom.,

405 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981).

7. The Insurance Trust was not an employer within the statutory meaning of 29 U.S.C. § 1002(5) since it was acting on behalf of the Association in procuring insurance, not the Association's member employers.

8. The Association is not an employee organization as defined by 29 U.S.C. § 1002(4).

9. The Insurance Trust contained no assets within the meaning of 29 U.S.C. § 1102 et seq., and was not liable for benefits to the employees of the employer members.

10. Plaintiff's state law claims for relief are not preempted by the provisions of the Employee

Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. since ERISA does not govern the insurance contract before the Court.

11. Because Prudential has denied that it owed any fiduciary duty to Plaintiff, or any beneficiary, and because ERISA does not regulate non-fiduciary conduct, there is no ERISA preemption in this action. Jordan v. Reliable Life Insurance Co., 694 F. Supp. 822 (N.D. Ala. 1988).

SIGNED this 2nd day of May, 1989.

Alice Oliver Trevathan /s/
Judge Presiding

APPROVED AS TO FORM:

CALVIN, DYLEWSKI, GIBBS,
MADDOX, RUSSELL & VERNER
A Professional Corporation

By: /s/
Millard A. Johnson
TSB #10772500

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 6, 1991

Ms. Susan Elizabeth Rees
U.S. Department of Labor
Office of Solicitor, Plan
Benefits Division
P.O. Box 1914
Washington, DC 20013

Mr. William J. Dyer
Weil, Gotshal & Manges
1600 First RepublicBank Center
700 Louisiana
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Ms. Doris A. Beutel
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Houston, TX 77002-5012

Mr. Peter J. Lynch
Calvin, Dylewski, Gibbs, Maddox &
Verner, P.C.
4500 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002-5012
RE: Case No. D-0364

Style: PRUDENTIAL INSURANCE COMPANY OF AMERICA v. BILLY W. BROWN

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as supplemented, with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk

By: /s/
Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 6, 1991

Ms. Susan Elizabeth Rees
U.S. Department of Labor
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1000 Louisiana Street
Houston, TX 77002-5012

RE: Case No. D-0364

Style: PRUDENTIAL INSURANCE COMPANY OF
AMERICA v. BILLY W. BROWN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk

By: /s/
Courtland Crocker,
Deputy

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 6, 1990

Hon. William J. Dyer
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4500 First Interstate Bank
1000 Louisiana
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Hon. Jess W. Mason
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1000 Louisiana Street
Houston, TX 77002

RE: CASE NO. 14-89-00695-CV

TRIAL COURT CASE NO. 81-31687

STYLE: Prudential Insurance Company of America v. Brown, Billy, W.

Counsel:

Please be advised that on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, October 8, 1990.

MARY JANE SMART, CLERK

By /s/
Deputy

[Filed on December 28, 1987]

NO. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HARRIS COUNTY,
	§	T E X A S
PRUDENTIAL	§	
INSURANCE COMPANY	§	151ST JUDICIAL
OF AMERICA	§	DISTRICT

DEFENDANT'S SECOND AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Prudential Insurance Company of America ("Prudential"), who makes the following answer to the pleadings filed by Plaintiff Billy W. Brown ("Mr. Brown"):

I.

Prudential generally denies the material allegations of Mr. Brown's pleadings, and requests this Honorable Court to require Mr. Brown to prove his

case by preponderance of the credible evidence presented to the Court and a jury, as required by the laws of the State of Texas.

II.

Without waiving the foregoing general denial, Prudential would show by way of affirmative defense:

a. Mr. Brown's claim for benefits owing under the Prudential insurance policy was for charges for unnecessary services and supplies, and, thus, such charges were excluded from policy coverage. The Prudential insurance policy does not cover charges for any service or supply not reasonably necessary for the medical care of the patient's sickness or injury. Prudential denied Billy W. Brown's

policy claims for Dr. Stanislaw R. Burzynski's treatment and the cost of the drug Antineoplaston because such treatment and drug were not reasonably necessary.

b. Mr. Brown's claim for breach of contract is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. Billy W. Brown was covered by the Prudential insurance policy through the International Automotive Service Association Insurance Trust ("Insurance Trust"). The International Automotive Service Association, formerly the International Garagemen's Association, established the Insurance Trust in order to provide an employee benefit plan. The International Automotive Service

Association is an employee organization within the meaning of ERISA; the association has employee participation, and the association's function, in part, is to deal with employers concerning employee benefit plans. Both the International Automotive Service Association and the Insurance Trust engage in interstate commerce.

c. Mr. Brown's claim for breach of the duty of good faith and fair dealing is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. Billy W. Brown was covered by the Prudential Insurance Policy through the International Automotive Service Association Insurance Trust ("Insurance Trust"). The International Automotive

Service Association, formerly the International Garagemen's Association, established the Insurance Trust in order to provide an employee benefit plan. The International Automotive Service Association is an employee organization within the meaning of ERISA; the association has employee participation, and the association's function, in part, is to deal with employers concerning employee benefit plans. Both the International Automotive Service Association and the Insurance Trust engage in interstate commerce.

d. Mr. Brown's claim for negligence is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C.§ 1001, et seq. Billy W. Brown was covered by the Prudential Insurance

Policy through the International Automotive Service Association Insurance Trust ("Insurance Trust"). The International Automotive Service Association, formerly the International Garagemen's Association, established the Insurance Trust in order to provide an employee benefit plan. The International Automotive Service Association is an employee organization within the meaning of ERISA; the association has employee participation, and the association's function, in part, is to deal with employers concerning an employee benefit plan. Both the International Automotive Service Association and the Insurance Trust engage in interstate commerce.

e. Mr. Brown's claim for breach of contract is also preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. because Sonny's Automatic Transmission Service, Inc., Billy W. Brown's employer, established and maintained an employee benefit plan through the Insurance Trust. Sonny's Automatic Transmission Service, Inc., is in the transmission servicing business, and in this business it engages in interstate commerce and participates in an industry or activity affecting interstate commerce.

f. Mr. Brown's claim for breach of the duty of good faith and fair dealing is also preempted by the Employee Retirement Income Security Act

of 1974, 29 U.S.C. § 1001, et seq. because Sonny's Automatic Transmission Service, Inc., Billy W. Brown's employer, established and maintained an employee benefit plan through the Insurance Trust. Sonny's Automatic Transmission Service, Inc., participates in the transmission servicing business, and in this business it engages in interstate commerce and is in an industry or activity affecting interstate commerce.

g. Mr. Brown's claim for negligence is also preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, because Sonny's Automatic Transmission Service, Inc., Billy W. Brown's employer, established and maintained an employee

benefit plan through the Insurance Trust. Sonny's Automatic Transmission Service, Inc., is in the transmission servicing business, and in this business it engages in interstate commerce and participates in an industry or activity affecting interstate commerce.

III.

Prudential at this time reserves the right to amend its answer to Mr. Brown's allegations after it has had an opportunity to investigate more closely these claims, as is its right and privilege under the Rules of Civil Procedure and the laws of the State of Texas.

IV.

WHEREFORE, PREMISES CONSIDERED, Prudential prays that upon final trial

and hearing hereof it have judgment in accordance with the law and the facts as determined by this Honorable Court and Jury, that it have its costs in this behalf incurred, and for such other and further relief, general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

BAKER & BOTTS

By /s/
William J. Dyer
Texas Bar No. 06321100
One Shell Plaza
Houston, Texas 77002
713/229-1639

ATTORNEYS FOR DEFENDANT
PRUDENTIAL INSURANCE
COMPANY OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument

has been hand delivered to counsel for the Plaintiff on this 28th day of December, 1987.

/s/
William J. Dyer

[Filed May 3, 1989]

NO. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HARRIS COUNTY,
	§	T E X A S
THE PRUDENTIAL	§	
INSURANCE COMPANY	§	151ST JUDICIAL
OF AMERICA	§	DISTRICT

DEFENDANT'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant The Prudential Insurance Company of America ("Prudential") respectfully files the following motions for judgment notwithstanding the verdict, new trial, and remittitur:

I. Motion for Judgment Notwithstanding the Verdict

A. Judgment Should Be Entered Based on the First Jury's Verdict for Prudential Because Judge Gupton Erred in Granting a New Trial

1. Prudential respectfully moves the Court to vacate the Final Judgment signed on April 3, 1989, in favor of Plaintiff Billy W. Brown ("Mr. Brown"), because Prudential was entitled to judgment in its favor based on the unanimous verdict rendered on June 4, 1986, in the first trial of this cause. On June 30, 1986, the Court (Hon. Solomon Casseb presiding) entered a take-nothing judgment based upon that verdict. However, on August 6, 1986, the Court (Hon. T.M. Gupton presiding) granted Mr. Brown's motion for new trial, and signed findings and

conclusions in connection with that ruling on August 11, 1986.

2. The record from the hearing on Mr. Brown's motion for new trial does not support Judge Gupton's findings and conclusions. For the reasons stated in Prudential's Motion for Reconsideration of Order Granting New Trial (filed on or about May 11, 1987, and incorporated herein by reference), there was no admissible, competent evidence of jury misconduct. The evidence upon which Mr. Brown relied was either (i) incompetent as a matter of law under Tex. R. Civ. P. 327(b) and Tex. R. Civ. Evid. 606(b), (ii) inadmissible hearsay, (iii) immaterial to the jury's unanimous verdict, or (iv) failed to show "outside

influence" as that term is defined under Texas law.

3. Accordingly, the Final Judgment in Prudential's favor that was signed on June 30, 1986, should be reinstated, notwithstanding the second jury's verdict.

B. Prudential is Entitled to Judgment Based on Its Affirmative Defense That the Underlying Contract Between Mr. Brown and Dr. Burzynski Was Illegal

4. As a matter of law, the underlying contract between Mr. Brown and Dr. Stanislaw R. Burzynski (or his clinic/institute) for treatment using antineoplastons was illegal, and thus void; accordingly, Prudential was not liable to reimburse Mr. Brown for the antineoplaston charges. Prudential

therefore respectfully moves for entry of judgment in its favor notwithstanding the second jury's verdict (or in the alternative, for a new trial), based on its affirmative defense of illegality.

5. At all times relevant to this lawsuit, section 16 of the Texas Food, Drug and Cosmetic Act provided that

> [n]o person shall sell, deliver, offer for sale, hold for sale or give away any new drug unless (1) an application with respect thereto has been approved and said approval has not been withdrawn under Section 505 of the Federal Act [21 U.S.C. § 355], or (2) when not subject to the Federal Act, unless such drug has been tested and has been found to be safe for use and effective in use under the conditions prescribed, recommended, or suggested in the labeling thereof, and prior to selling or offering for sale such drug, there has been filed with the [Texas] Commissioner of Health an application setting forth

[extensive data regarding the drug].

Tex. Rev. Civ. Stat. Ann. art. 4476-5 (Vernon 1976).

6. As Mr. Brown has judicially admitted, "[t]here is no dispute in this case that antineoplastons were not approved by the FDA. Nor were they approved by the Texas Department of Health."[18]

7. Dr. Burzynski's sale of antineoplastons to Mr. Brown therefore violated section 16 of the Texas Food, Drug and Cosmetic Act. At all times pertinent to this lawsuit, section 3 of that Act, Tex. Rev. Civ. Stat. Ann. art.

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18. Plaintiff's Response to Defendant's Motion for Leave to File Third Amended Answer and Special Exceptions Thereto (filed on or about January 27, 1989), at 6-7.

4476-5, § 3(d) (Vernon 1976) (recodified at Tex. Rev. Civ. Stat. Ann. art. 4476-5, # 3(e) (Vernon Supp. 1989), provided that it was "unlawful and prohibited" to sell, deliver for sale, hold for sale, or offer for sale any article in violation of section 16.

8. Mr. Brown's attorneys attempt to rely[19] on section 5.09 of the Texas Medical Practice Act, which provides in pertinent part that "[a] person licensed to practice medicine under this Act is authorized to supply the needs of his patients with any drugs or remedies as are necessary to meet the

---

19. Plaintiff's Response to Defendant's Motion for Leave to File Third Amended Answer and Special Exceptions Thereto (filed on or about January 27, 1989), at 7.

patients' immediate needs." Tex. Rev. Civ. Stat. Ann. art. 4495b, § 5.09(a) (Vernon Supp. 1989).

9. Mr. Brown's attorneys apparently contend that this section of the Medical Practice Act grants a blanket exemption to all licensed physicians which would allow them to prescribe illegal drugs if they deem those drugs to be "necessary to meet the patients' immediate needs." But the Medical Practice Act does not so state; no Texas case so holds; and statutory construction of the term "any drugs" to include illegal drugs would make a mockery of both the Medical Practice Act and the Texas Food, Drug and Cosmetic Act. Instead, the only fair and reasonable interpretation of this

section in the Medical Practice Act is that it referred to legal drugs.

10. Under familiar rules of statutory construction, one statute should not be construed in a manner that makes another, related statute meaningless. The obvious intent of the Texas Food, Drug and Cosmetic Act was to bring within State regulation those new drugs that were not being regulated by the Federal Food & Drug Administration. There is nothing in the Medical Practice Act which suggests that the Legislature intended to give physicians the right to prescribe illegal drugs.

11. The State Board of Medical Examiners obviously shares this view of these two statutes, as evidenced by the fact that they have sought to have Dr.

Burzynski's license suspended or revoked for violation of these statutes.[20]

12. The Texas Food, Drug and Cosmetic Act is an important statute enacted to protect the public health. As such, it "is not merely regulatory," and contracts made in violation thereof are illegal, void, and unenforceable. Peniche v. Aeromexico, 580 S.W.2d 152 (Tex. Civ. App. -- Houston [1st Dist.] 1979, no writ). "[O]ur courts will neither aid in the enforcement of such a contract, nor grant any relief to a party who has executed it." Id. at 156. Indeed, Texas courts will deny recovery when enforcement of a contract is sought

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20. See Prudential's Motion for Continuance (filed on or about January 13, 1989).

even by someone, like Mr. Brown, whom the statute was designed to protect. See, e.g., Montgomery Ward v. Lusk, 52 S.W.2d 1110 (Tex. Civ. App. -- Waco 1932, writ ref'd); Peniche, 580 S.W.2d at 155-56. Moreover, "[a] contract to do a thing which cannot be performed without a violation of the law is void, whether the parties know the law or not." Texas Employers' Insurance Association v. Tabor, 283 S.W. 779 (Tex. Comm. App. 1926, judgmt. adopted).

13. Prudential obviously does not contend that its contract of insurance with the IGA Insurance Trust, under which Mr. Brown was a beneficiary, was illegal. However, "[t]he test of whether a demand connected with an illegal transaction

may be enforced at law is whether or not a case may be established without reliance on the illegal transaction." Pioneer Mutual Compensation Co. v. Diaz, 177 S.W.2d 202, 203 (Tex. 1944). In this case, all of Mr. Brown's claims against Prudential are premised on his contractual obligation to pay Dr. Burzynski for antineoplaston therapy; in the words of the Pioneer court, his case may not be established without reliance on the illegal transaction between him and Dr. Burzynski, and his demand for damages from Prudential therefore may not be enforced at law.

C. Judgment Should Be Entered for Prudential Because All of the Claims Mr. Brown Has Pleaded Are Preempted by ERISA

14. For the reasons stated in Defendant Prudential Insurance Company of America's Proposed Findings of Fact and Conclusions of Law on ERISA (filed on January 18, 1989, and hereby incorporated by reference), all of the state-law claims pleaded by Mr. Brown are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.

15. At a post-verdict hearing on Friday, March 31, 1989, the Court granted Mr. Brown leave to file, in the alternative to his state-law claims, a trial amendment raising claims under ERISA; to date, he has not chosen to do so.

16. Having failed to avail himself of his opportunity to replead

under ERISA, Mr. Brown's entire lawsuit should be dismissed with prejudice, and judgment should be entered for Prudential. Cathey v. Metropolitan Life Insurance Co., 764 S.W.2d 286, 289 (Tex. App. -- Houston [1st Dist.] 1988, no writ) (affirming trial court's dismissal of state law claims based on ERISA preemption when plaintiffs "were offered the opportunity to amend their petition to assert a cause of action under ERISA but expressly refused to do so").

II. **Motion for New Trial**

17. Prudential respectfully moves for a new trial, in support of which Prudential re-urges (and hereby incorporates by reference) all of its objections to the Court's charge, including but not limited to its

objections (i) that there was no evidence to justify the submission of any jury questions[21] against Prudential; (ii) that there was insufficient evidence to support the submission of such questions; and (iii) that the jury's affirmative findings in response to such questions were against the great weight and preponderance of the evidence.

18. More specifically, but without waiver of the foregoing grounds, Prudential also moves for a new trial on grounds that there was no evidence (or in the alternative, there was insufficient evidence, or in the

---

21. More specifically, Questions No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 (and subparts a through e thereof).

alternative, the jury's findings were against the great weight and preponderance of the evidence) with respect to any mental anguish suffered by Mr. Brown. Mr. Brown testified at the second trial that he had never even lost a single night's sleep because of his concern with his unpaid medical bills. Nor did he offer any proof of any physical manifestations that are the necessary predicate to the recovery of mental anguish damages under Texas law. Finally, Mr. Brown admitted that he had never been harassed or pressed by Dr. Burzynski for payment of his bills, and that he had not had to sell his family farm or suffer any other sévere economic disruptions of his life. The evidence

simply cannot support an award of $75,000 for mental anguish damages.[22]

19. Prudential also moves for a new trial on grounds that the Court's charge permitted the jury to compensate Mr. Brown twice for the same element of damages -- that is, his alleged mental anguish from Prudential's claims handling and decision. In particular, it was improper to submit both Question No. 2 (on Prudential's alleged breach of a duty of good faith and fair dealing) and Question No. 5 (on Prudential's alleged unreasonable delay in communicating its denial of Mr. Brown's

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22. In the alternative, Prudential moves the Court to disregard the jury's answers to Questions No. 3, 4, 6, and 7 regarding Mr. Brown's alleged mental anguish.

claim), since Question No. 5 was simply a "phase or shade" of the same inquiry made in Question No. 2. Question No. 6 was also defective in that it inquired only whether Prudential's alleged unreasonable delay was "a proximate cause of damages to Billy W. Brown"; the question should have been limited to "mental anguish," rather than referring to damages generally and unspecifically. The net effect of these erroneous submissions has been to allow Mr. Brown to "double-dip," or to achieve a double recovery for the same alleged injury.

20. Prudential further moves for a new trial on grounds that there was no pleading to support the submission of Questions No. 5, 6, and 7 regarding Prudential's alleged

unreasonable delay in making its claims decision. In the alternative, Prudential moves the Court to disregard the jury's affirmative response to Questions No. 5, 6, and 7 regarding such alleged delay.

21. Without waiver of the foregoing grounds, Prudential also moves for a new trial on grounds that there was no evidence (or in the alternative, there was insufficient evidence, or in the alternative, the jury's findings were against the great weight and preponderance of the evidence) with respect to Question No. 8 regarding Prudential's alleged "conscious indifference to, or reckless disregard of, [Mr. Brown's] rights or welfare." All of the evidence adduced at trial

demonstrated that Prudential carefully and diligently considered whether Mr. Brown's antineoplaston therapy was covered under the terms of his insurance policy. Even if the jury believed that Prudential reached the wrong conclusion, there was simply no credible evidence to establish that Prudential was indifferent to Mr. Brown's rights or welfare -- much less that Prudential recklessly disregarded them.

22. Prudential also moves for a new trial on grounds that the Court improperly excluded material, admissible evidence offered by Prudential, including but not limited to the following:

a. The testimony of Glenda Steed regarding her

observations of Dr. Burzynski's patients over several years, certain admissions made to her by Dr. Burzynksi's "Director of Pharmacy," Barbara Burzynski, and other matters tending to (i) impeach the credibility of Mr. Brown's expert witnesses, and (ii) refute Mr. Brown's claim that antineoplaston therapy was "reasonably necessary" for the treatment of his cancer.

b. The testimony of Dr. Emil J. Freireich regarding his inquiries into antineoplaston therapy, his opinion that antineoplaston therapy was not reasonably necessary for the treatment of any cancer patient,

and that Dr. Burzynski's antineoplaston therapy displayed many features common to unproven or "quack" remedies in general.

c. The testimony contained in the bill of exceptions from Dr. Burzynski, including his admissions that (i) he obtained urine from Gilley's nightclub and other sources without any adequate controls or inspection of urine donors; (ii) he was cited by the FDA for unsafe and impure manufacturing techniques that had occurred during the time period of Mr. Brown's therapy; (iii) that he had been enjoined by the United States District

Court for the Southern District of Texas from continuing to ship his antineoplastons across state lines in violation of the Federal Food, Drug and Cosmetic Act; and (iv) that the Texas Board of Medical Examiners has commenced proceedings to suspend or revoke his license to practice medicine for violations of Texas laws governing the conduct of physicians.

d. The testimony from Angelina Wise offered to explain further the circumstances of Prudential's mistaken payments to other insureds for antineoplaston therapy.

23. Prudential also moves for a new trial on grounds that the Court erred in admitting, over Prudential's objections, certain prejudicial, inadmissible evidence offered by Mr. Brown, including but not limited to the following:

a. Evidence that Prudential had made payments with respect to other insureds.

b. References to payments made to Dr. Burzynski or other patients of his by insurance companies other than Prudential.

c. Hearsay testimony regarding Dr. Sproul's onetime (and later retracted) opinions in favor of antineoplaston therapy.

d. Evidence of Prudential's wealth and resources.

24. Prudential also moves for a new trial on grounds that the Court abused its discretion in denying Prudential's Motion for Continuance, based on the pending proceedings to revoke or suspend Dr. Burzynski's license.

25. Finally, Prudential moves for a new trial -- to the Court, rather than to a jury -- on grounds that the Court erred in denying Prudential's Motion to Strike Plaintiff's Demand for Jury Trial. For the reasons stated in Defendant Prudential Insurance Company of America's Proposed Findings of Fact and Conclusions of Law on ERISA (filed

on January 18, 1989, and hereby incorporated by reference), Mr. Brown's state-law claims are preempted by ERISA, and ERISA does not allow for a jury trial. E.g., Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980); Sweeney v. Aetna Life Insurance Co., No. H-87-1435 (S.D. Tex. Feb. 18, 1988).

III. **Motion for Remittitur**

26. Prudential respectfully moves the Court to offer a remittitur (and to grant a new trial if Mr. Brown fails to accept the remittitur) with respect to most or all of the $500,000 in exemplary damages awarded by the jury. This award is manifestly excessive and grossly disproportionate when compared to Mr. Brown's stipulated contract damages of $42,000. The Court,

in the exercise of its sound discretion, should grant a remittitur of that entire award, or -- at a minimum -- all but $126,000 thereof (comprising three times Mr. Brown's contract damages).

27. In the alternative, Prudential respectfully moves the Court to offer a remittitur (and to grant a new trial if Mr. Brown fails to accept the remittitur) on grounds that the award of $500,000 in exemplary damages is excessive and unconstitutional. Both the Bill of Rights of the Texas Constitution[23] and the Eighth Amendment to the United States Constitution

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23. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. . . ." Tex. Const. art. I, § 13.

(incorporated and made binding upon the States through the Due Process Clause of the Fourteenth Amendment)[24] contain prohibitions against excessive fines and cruel and unusual punishments. See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 527, 57 U.S.L.W. 3390 (1988) (granting a writ of certiorari from 845 F.2d 404 (2d Cir. 1988), on the question of whether an award of $6 million in punitive damages on account of a purely economic tort was excessive under the Eighth Amendment or otherwise).

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24. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VII.

28. Finally, Prudential moves the Court to offer a remittitur (and to grant a new trial if Mr. Brown fails to accept the remittitur) as to all damages except Mr. Brown's contract damages of $42,000, plus interest and attorneys' fees. For the reasons stated in Defendant Prudential Insurance Company of America's Proposed Findings of Fact and Conclusions of Law on ERISA (filed on January 18, 1989, and hereby incorporated by reference), Mr. Brown's state-law claims are preempted by ERISA. Exemplary and other extra-contractual damages (such as mental anguish damages) are not recoverable under ERISA. E.g., Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985); Powell v. Chesapeake & Potomac Telephone Co.,

780 F.2d 419 (4th Cir. 1985), 476 U.S. 1170 (1986).

IV. Conclusion and Prayer

29. For the foregoing reasons, Prudential respectfully moves the Court to enter judgment in its favor notwithstanding the verdict; in the alternative, to grant a new trial; or in the alternative, or order a remittitur.[25]

Respectfully submitted,

WEIL, GOTSHAL & MANGES

By /s/
William J. Dyer

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25. To the extent that any of Prudential's arguments and statements of grounds for one of these motions may support the other motions made herein, such arguments and grounds are incorporated by reference in such other motions.

Texas Bar No. 06321100
Doris A. Beutel
Texas Bar No. 02275130
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5186

ATTORNEYS FOR DEFENDANT THE
PRUDENTIAL INSURANCE
COMPANY OF AMERICA

Certificate of Service

I hereby certify that a true copy of the foregoing was hand delivered to counsel for Plaintiff Billy W. Brown, Millard A. Johnson, Esq., on this 3rd day of May 1989.

/s/
William J. Dyer

October 5, 1990

Mr. William J. Dyer
Ms. Doris A. Beutel
Weil, Gotshal & Manges
700 Louisiana, Ste. 1600
Houston, TX 77002

Mr. Mark G. Lazarz
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Houston, TX 77002

Mr. Millard A. Johnson
Calvin, Dylewski, Gibbs et al
4500 First Interstate Bank
1000 Louisiana
Houston, TX 77002

RE: Case No. D-0364

Style: PRUDENTIAL INSURANCE COMPANY OF AMERICA v. BILLY W. BROWN

Dear Counsel:

Motion for extension of time to file application for writ of error under Rule 130(d), T. R. A. P., was this day granted.

The application for writ of error is due to be filed in the Court of Appeals on or before the 15th day of October, 1990.

JOHN T. ADAMS, CLERK

By: /s/
Trencha Damian, Deputy

AGREEMENT AND DECLARATION OF TRUST

AGREEMENT made at Austin, County of Travis, State of Texas, as of the 18th day of March, 1964, between the INDEPENDENT GARAGEMEN'S ASSOCIATION OF TEXAS, herein called the Association, and HENRY ROSE, FRANK LOPEZ, ALLEN RICHEY as Trustees, who by their execution of this Agreement hereby accept the trust herein created to be known as the INDEPENDENT GARAGEMEN'S ASSOCIATION INSURANCE TRUST, herein called the Trust, and declare that they will administer the Trust pursuant to the provisions of this Agreement,

WHEREAS, employers who desire to provide group insurance for their employees and the families of such employees have requested the Association to enter into an agreement with trustees under which any monies paid to the Trustees on account of such insurance will be held in a fund forming the trust estate of the INDEPENDENT GARAGEMEN'S ASSOCIATION INSURANCE TRUST, which trust fund is herein referred to as the Fund;

NOW, THEREFORE, in consideration of the premises it is mutually agreed as follows:

ARTICLE I

PURPOSE OF THE TRUST

The purpose of the Trust is to establish and maintain the Fund to provide life and accident and health insurance for employees of employers and members of families of employees. The term "employees" shall comprise employees of employers, and proprietors and partners whenever an employer is a proprietorship or a partnership, if such proprietors and partners are actively engaged in and devote a substantial part of their time to the conduct of the business of the employer, and the Trustees and their employees, if the Trustees have made arrangements to such effect with the insurance carrier. Any of such insurance as the Trustees may determine shall be provided through one or more group policies issued by insurance carriers.

ARTICLE II

THE POLICIES

Section 1. PROCURING OF POLICIES. Upon execution of this Agreement the Trustees shall procure a policy or policies providing such of the insurance specified in Article I as they shall determine. Additional policies providing any of such insurance as the Trustees shall determine may be procured

by them at any time thereafter. The term "policy" as used herein shall include any rider, endorsement, or amendment made a part of a policy.

Section 2. CONTROL BY TRUSTEES. The Trustees shall agree with each insurance carrier upon all of the provisions to be contained in each policy and the requirements for insurance thereunder. All the rights and privileges granted to the policyholder by a policy or allowed by the insurance carrier shall be vested in the Trustees and they may take any action with respect to each policy or the insurance provided thereunder permitted by the insurance carrier. The Trustees may enter into such agreements with the insurance carrier as they deem necessary or advisable in regard to any such insurance.

Section 3. SHORT METHOD CLAIM ADMINISTRATION. The Trustees may agree with each insurance carrier that any one or more persons designated by them, which may include one or more of the Trustees, shall sign drafts upon the insurance carrier in the amounts approved for the payment os claims under a policy.

ARTICLE III

PARTICIPATION

Section 1. ENROLLMENT OF SUBSCRIBERS AND PAYMENTS OF SUBSCRIBERS TO THE FUND. A corporation, proprietorship or partnership that has executed an employer's request for participation in the trust may request participation in the insurance under a policy by submitting a request for such participation to the trustees together with an initial payment determined by the Trustees on the basis of the insurance to be provided. If the requirements for the participation in the insurance under a policy are satisfied, the corporation, proprietorship pr partnership shall be enrolled as a Subscriber to the Trust. If a corporation, proprietorship or partnership is not accepted for such participation any payment made by it for such purpose shall be returned and there shall be no further obligation in connection therewith. A corporation, proprietorship or partnership that is accepted as a Subscriber shall thereafter make payments on such dates and in such amounts as the Trustees shall require for providing the insurance under each policy and administering the Trust. Participation of a corporation, proprietorship or partnership under each policy shall continue until all insurance upon which

the payments of the Subscriber were based has been terminated pursuant to the provisions of the policy. If permitted by the insurance carrier, the Association may become a Subscriber and participate in the insurance under a policy on the same basis as other corporations.

Section 2. CONTRIBUTIONS REQUIRED OF EMPLOYEES OF SUBSCRIBERS. To the extent and in the manner permitted by any policy, rules, regulations and laws which are applicable, each Subscriber may require contributions from his insured employees toward the cost of providing insurance under a policy, and such contributions shall be included in the payments of the Subscribers to the Fund.

Section 3. COVERAGE OF TRUSTEES AND THEIR EMPLOYEES. If permitted by the insurance carrier, the Trustees may arrange with the insurance carrier that the Trustees, their employees, and the families of the Trustees and their employees, be insured under the policies. The portion of the payments required for such insurance which is not derived from any contributions required of the Trustees and their employees shall be at the expense of the Fund.

Section 4. ADMINISTRATION OF TRUST. To properly administer the insurance and the Trust, the Trustees

may adopt such rules and regulations including any requirements for eligibility of Subscribers for participation in the Trust and require the Subscribers to furnish such information as the Trustees deem necessary or advisable.

Section 5. INTEREST OF THE ASSOCIATION, EMPLOYERS, PERSON INSURED AND PERSONS CLAIMING THROUGH THEM. Neither the Association, nor any Subscriber, person insured or person claiming by or through an insured person by reason of having been named a beneficiary for insurance benefits or otherwise, shall have any claim against the Fund or any other property of the Trust. The rights and interests of persons insured and persons claiming by or through them shall be limited to the insurance benefits specified in the policies.

ARTICLE IV

NATURE AND USE OF THE FUND

Section 1. NATURE OF THE FUND. The Fund shall consist of all Subscriber payments made to the Trustees in accordance with the provisions of Section 1 of Article III, policy dividends whether received by the Trustees or left with insurance carriers to accumulate with interest, investments made by the Trustees and income thereon

and any other money or property which shall come into the hand of the Trustees in connection with the administration of the insurance and the Trust. The Trustees may make investments only in such securities as are legal for investment of trust funds under the law of the jurisdiction first above named.

Section 2. USE OF THE FUND. The Trustees may use the Fund as follows:

(a) to pay all expenses which they consider necessary in establishing the Trust and Fund, and in administering the Trust and the insurance;

(b) to pay premiums on the policies;

(c) to make investments as specified in Section 1 of this Article IV;

(d) to make refunds to Subscribers;

(e) to apply amounts for the benefit of persons insured under the policy or policies if such persons make contributions toward the cost of providing

insurance on themselves and their families.

ARTICLE V

THE TRUSTEES

Section 1. SELECTION OF A CHAIRMAN AND SECRETARY. The Trustees shall select one of their number to act as chairman and one to act as secretary, to serve for such periods as the Trustees shall determine.

Section 2. TERM OF OFFICE OF TRUSTEES. Each Trustee shall serve until his death, resignation or removal.

Section 3. RESIGNATION OF A TRUSTEE. A Trustee may resign upon giving thirty days' notice in writing to the Association.

Section 4. REMOVAL OF A TRUSTEE. Any Trustee may be removed from office at any time by an instrument in writing signed by the Association and delivered to all the Trustees.

Section 5. APPOINTMENT OF A SUCCESSOR TRUSTEE. IN case any Trustee shall die, resign or be removed, a successor Trustee shall be appointed forthwith by an instrument in writing signed by the Association and delivered to all of the Trustees. Immediately upon his acceptance of the trusteeship

in writing a successor Trustee shall become vested with all the property, rights, power and duties of a Trustee hereunder with like effect as if originally named as a Trustee.

Section 6. COMPENSATION OF TRUSTEES AND THE ASSOCIATION AND ITS EMPLOYEES. The Trustees shall be reimbursed for all reasonable and necessary expenses incurred by them in the performance of their duties and shall otherwise receive no compensation, except that provision may be made to compensate one or more Trustees for special executive or administrative services performed in the administration of the Trust. The Trustees may call upon the Association and its employees for assistance in the administration of the Trust and may reimburse the association and its employees for any expenses incurred in connection therewith.

Section 7. MEETINGS OF TRUSTEES. A meeting may be called at any time by the chairman or any two of the Trustees upon giving five days' written notice to the other Trustees.

Section 8. REQUIRED VOTE OF TRUSTEES. Any action by the Trustees may be taken either at a meeting or in writing without a meeting. Concurrence of a majority of the Trustees shall be required for action taken at a meeting

and concurrence of all the Trustees shall be required for action taken without a meeting. No action shall be taken unless there are at least two Trustees.

Section 9. NAME OF THE TRUSTEES COLLECTIVELY AND EXECUTION OF INSTRUMENTS. The name of the Trust may be used to designate the Trustees collectively and all instruments may be effected by them in such name upon the signature of any Trustee or other person that the Trustees may designate for that purpose.

Section 10. LIABILITY OF TRUSTEES. No Trustee shall be liable for any action pursuant to the Trust in good faith taken or omitted nor for any action taken or omitted by any agent, employee or attorney selected with reasonable care not for any action taken or omitted by any other Trustee, nor for loss incurred through investments of monies of the Trust or failure to invest.

ARTICLE VI

DEALINGS WITH THE TRUSTEES

In dealings with the Trustees, there shall be no obligation to see to application by them of any funds or property of the Trust or to see that the terms of the Trust have been complied

with and no obligation to inquire into the necessity or expediency of any act of the Trustees, and every instrument effected by the Trustees, whether signed by all of them or in the manner set forth in Section 9 of Article V, may be relied upon as to any facts set forth therein and shall be conclusive that

(a) at the time of delivery of said instrument, the Trust was in full force and effect and, except where there has been notice of an amendment, was in the form set forth in this Agreement as of its effective date; and

(b) said instrument was executed in accordance with the terms and conditions of the Trust; and

(c) the execution and delivery of the instrument was duly authorized.

ARTICLE VII

AMENDMENT AND TERMINATION OF THE TRUST

Section 1. AMENDMENT. The Trustees may amend this Agreement at any time to such extent as they deem necessary or advisable, except that no amendment shall change the Trust to a

purpose other than as set forth in Article I nor shall there by any amendment of this Article VII.

Section 2. TERMINATION. The Trust shall terminate at the expiration of 21 years from the date first above written but may be terminated at any time prior thereto by an instrument in writing executed by the Association. Upon termination of the Trust, the Trustees shall pay all obligations of the Trust and charge them to the Fund. The Trustees shall thereupon first use the Fund to continue insurance on all employees insured under the policies and the families of such employees to the extend possible, and then either apply any remaining balance of the Fund for the benefit of such of those employees and the families of such employees as were insured thereunder at the time of the termination of the policies, in such manner as the Trustees determine shall best carry out the purpose for which the Fund was established, or pay such balance to such employees. Anything hereinabove to the contrary notwithstanding the Trustees, upon termination of the Trust and settlement of all obligations of the Trust, may, with the consent of the Association, transfer the policies and the remaining surplus, or any portion thereof, of the Fund to the trustees of any trust or trusts established for a substantially similar purpose to be applied for uses

substantially similar to those set forth in Section 2 of Article IV.

ARTICLE VIII

SITUS AND CONSTRUCTION OF THE TRUST

The Trust is accepted in the jurisdiction first above named and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of such jurisdiction.

IN WITNESS WHEREOF, this Agreement has been executed by the undersigned as of the date first above written.

INDEPENDENT GARAGEMEN'S ASSOCIATION OF TEXAS

By /s/
President

/s/ Henry Rose, San Antonio
Trustee

/s/ Frank S. Lopez
Trustee

/s/ Allen Richey
Trustee

Attest:

/s/ Robert Ratliff
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 1991, three (3) copies of the Appendix to Petition for Writ of Certiorari were served by first class mail, postage prepaid, to Millard A. Johnson, 4500 First Interstate Bank, 1000 Louisiana, Houston, Texas 77002-5012, (713) 224-5771. All parties required to be served have been served. I am a member of the Bar of this Court.

Morton L. Susman

MORTON L. SUSMAN
Counsel of Record